

# **TRANSPORTATION REPORT**

From: Terry Whiteside

To: The Montana Wheat & Barley Committee

Date: December 23, 2010



## **Rail Legislation Update - THE 112th Outlook**

As we all know - the 111th Congress got bogged down even before the August recess and legislation on things like Captive Shipper, Railroad Antitrust, Rail Infrastructure, STB reauthorization - went nowhere. Be mindful that this Congress for the first time in history - did not pass a single budget of the 13 budget bills that need to be passed. We are not criticizing or taking sides here - but it is important when looking at the progress made by the Captive Shippers - to at least recognize the difficult environment that everyone working to pass legislation this year was faced with.

The 111th Congress was very interesting from progress made by the shippers looking to educate legislators in both the House and Senate. Today, if a shipper group heads into a Congressional office it is very likely that when the conversation opens with 'we are here to talk about the railroad problem' - the reply answer back is something along the lines, "oh, the captive shipper problems".

What was accomplished:

1. Senator Kohn - passed in the Senate Judiciary Committee - unanimously - a bill to lift the anti-trust protects enjoyed by the railroad industry - in the summer of 2009

2. A similar bill came out the House Judiciary - unanimously - in late summer 2009.
3. Over 20 States Attorney Generals led by Montana's Steve Bullock lobbied hard to get these bills passed.
4. Senator Rockefeller working with shipper and railroads (separately) had his Commerce Committee staff craft a bill that would both reauthorize the STB and provide relief to captive rail customers. This bill was passed out of full Committee on December 17, 2009.
5. Senator Kohl and Senator Rockefeller agreed to merge their bills in January, 2010 in order to present to the Senate a single bill on transportation. The Railroads openly opposed the anti-trust bill and seemed to provide an anchor or stall on the STB Reauthorization bill progress.
6. Chairman Rockefeller held a hearing on September 15th on the STB Reauthorization/Captive Shipper bill (S2889) wherein the Chairman chastised the RR's for not working with the Commerce Committee staff - and he further stated unequivocally that he will move to pass this legislation early in the upcoming 112th Congress if it is not passed in the 111th.

Senate Commerce Committee Chair Jay Rockefeller (D-WV) promised to press forward with rail relief legislation shortly after the Committee released their report detailing how the rail industry has deceived their way out of pro-consumer regulation.

"We need a rail system that works not just for the freight railroads, but for all-shippers, passengers and consumers. Unfortunately, it has felt at times like the railroads- some much more than others- have attempted to delay this process, hoping that these reforms will die if they can only stretch the process out through the elections," Rockefeller said at the September hearing.

7. Look for Senator Kohl to reintroduce his Railroad Antitrust bill on the very first day of the 112th Congress and get the steam under this bill.

8. Senator Cantwell (D-WA), Murray (D-WA), and Lautenberg (D-NJ) introduced the "Focusing Resources, Economic Investment, and Guidance to Help Transportation (FREIGHT) Act of 2010" - a bill to provide infrastructure investment in the Railroad industry.
9. With the change of guard in the House - there will be lots of new faces that will require education by the captive shippers - early in the Congressional session.
10. The Commerce Committee staff at the September 15th hearing on S2889 - published an in-depth study on the railroad industry - showing that it is one of the most profitable industries in the U.S. (5th most profitable). See article below on a summary of this published study.
11. The Congress needs to pass a Surface Transportation (Highway) bill - and in some minds this is a must pass in the 112th as it was due to be passed in the 111th. Many feel that the funding mechanism need to be readjusted.

## **Big Changes In The 112th Congress**

As everyone is aware, the fall elections provided one of the most interesting elections in many years. One of the most interesting will be the number of new members of each Committee.

The largest Committee in the House is the House Transportation and Infrastructure Committee - currently 75 members. All of these members are very important to gaining a consensus of the issues in transportation. As an example of the changes that have occurred - the new Republicans that have been named to the House T&I are:

Lou Barletta (Pa.)  
Larry Bucshon (Ind.)  
Chip Cravaack (Minn.)  
Rick Crawford (Ark.)  
Jeff Denham (Calif.)  
Blake Farenthold (Texas)  
Stephen Fincher (Tenn.)  
Bob Gibbs (Ohio)  
Frank Guinta (N.H.)  
Richard Hanna (N.Y.)

Andy Harris (Md.)  
Jaime Herrera (Wash.)  
Randy Hultgren (Ill.)  
Jeff Landry (La.)  
James Lankford (Okla.)  
Billy Long (Mo.)  
Tom Reed (N.Y.)  
Jim Renacci (Ohio)  
Tim Scott (S.C.)  
Daniel Webster (Fla.)

## **Senate Report - RR's Are Some Of The Most Highly Profitable Business In U.S. Economy**

The report, released by Chairman Rockefeller (D-WV), at the September 15 Commerce Committee hearing, concluded that the railroads are some of the "most highly profitable businesses in the U.S. economy," but found a consistent pattern over the past several years of the railroads downplaying their success to the federal government in order to preserve their favored regulatory position. The railroads have then use this favored position to extract excessive rates from captive American businesses and farmer producers that must utilize rail to ship their products to market.

[http://commerce.senate.gov/public/?a=Files.Serve&File\\_id=154d36ff-af01-428d-80c0-14e32563b31d](http://commerce.senate.gov/public/?a=Files.Serve&File_id=154d36ff-af01-428d-80c0-14e32563b31d)

## Railroads – Are Doing Very Well Despite What They State Publically



### All Is Not What It Appears To Be!!!!

- In April 2008 (STB Ex Parte No. 677 April 17, 2008) the AAR in written testimony stated that "the railroad's profitability was 'still far from stellar in comparison to the many other industries against which railroad's compete for capital' and that the rail industry profitability has consistently lagged most other industries – and that is still the case today"
- **A review of the largest four railroads by the SEC filings shows just how profitable the large railroads have become over the last decade.**

From the Senate Commerce  
Cmte report 09-15-10

## Railroads Rank the 5<sup>th</sup> Most Profitable Industry Group in U.S. 2008 – Fortune Magazine

Top industries: Most profitable

Industry Rank	Industry	2008 Profits as % of Revenues
1	<a href="#">Network and Other Communications Equipment</a>	20.4
2	<a href="#">Internet Services and Retailing</a>	19.4
3	<a href="#">Pharmaceuticals</a>	19.3
4	<a href="#">Medical Products and Equipment</a>	16.3
5	<a href="#">Railroads</a>	12.6
6	<a href="#">Financial Data Services</a>	11.7
7	<a href="#">Mining, Crude Oil production</a>	11.5
8	<a href="#">Securities</a>	10.7
9	<a href="#">Oil and Gas Equipment, Services</a>	10.2
10	<a href="#">Scientific, Photographic, and Control Equipment</a>	9.9



From the Senate  
Commerce Cmte  
report 09-15-10



## RR's Profit Margins Are Growing and Profitability is Soaring



- “In 2008, the railroad companies’ 12.6% profit margin placed the industry fifth out of the 53 industries on the Fortune’s list of “most profitable industries” trailing only the communications, Internet, pharmaceutical, and medical device industries<sup>1</sup>”
- “Between 2001 and 2008, the railroad industry was ranked in the top ten on Fortune’s profitability list SEVEN out of EIGHT times”

From the Senate Commerce  
Cmte report 09-15-10

<sup>1</sup> Fortune, 2008's Top Industries: Most profitable, Return on Revenues

## Railroad's Are Earning Record Profits In This Recession

- UP – a record third Quarter – net revenue up 51%
- BNSF – BNSF reported their Net jumped 45% in third quarter year over year and revenue increased by 22.1% to \$4.391 billion
- CSX – posted a fourth straight quarter of year-over-year earnings increases
- KCS - net income rise 85 percent in the third quarter



## **STB Holds Oral Argument in State of Montana Attorney General's Complaint on BNSF 48 vs 52 Car Rates**

The STB held an Oral Argument in Docket 42124, State of Montana vs. BNSF Railway Company, Complaint - Motion to Dismiss.

During the oral argument, the BNSF admitted under questioning by the STB Board members that the move from 52 cars to 48 cars was in fact a 'gaming' of the URCS system. The BNSF stated that the move was because they could lower the RVC ratios substantially below the RVC ratios of 52 cars because of an adjustment the formula makes on shipment sizes below 50 cars.

The STB questioned the BNSF at length about the actual sizing of the car shipments and seem to conclude that the STB might be inclined to focus on car shipment sizes rather than an individual shipment size. For example, the STB might look at a train of two 48 car shipments as the size actually shipped, or if a shipment consisted of 48 +4 cars - then look at the shipment size as a 52 car movement for the purposes of costing.

The BNSF also argued that 'gaming' - a word it did not like utilized to characterize what the BNSF was doing - was not illegal per se. BNSF also stated it was weary of 'consultants' saying to Montana farm producers their RVC ratios were high when looking at 52 car shipments and that by moving to 48 car shipment sizes and then teaching farm producers to utilize URCS formulas on the STB website - they have been able to overcome some of the criticisms they were receiving with high 52 car rates.

The State of Montana concentrated its efforts on the fact that BNSF required elevators in Montana throughout the 1980's and 1990's to build 52 car facilities and now has replaced this 52 car requirement with mandated maximum 48 car shipments sizes. A Motion to

Dismiss without hearing the facts of the case is unwise by the STB and illegal without the merits of the case being heard.

The STB was concerned with the BNSF actions in the case.

## **NEW STB COMMISSIONER NOMINEE - ANN BEGEMAN**

The White House announced December 21st, the President's intent to nominate Ann Begeman for membership on the Surface Transportation Board. Ann will take the place of Chip Nottingham, whose term expires December 31, 2010.

Since the Senate is set to adjourn no later than midnight Thursday, December 23, the actual nomination is likely to be sent to the Senate early next year. We would expect early and quick committee and full Senate action on her confirmation. Chip Nottingham can serve until Ann is confirmed by the Senate.

Rail customers have had extensive experience with Ms. Begeman. Rail customer representatives worked closely with Ann, particularly in 2009, developing the Surface Transportation Board Reauthorization Act of 2009, S.2889. Ann currently serves as Republican Staff Director of the Senate Commerce, Science and Transportation Committee. Since the seat that is being vacated is a "Republican" seat - actually the position, by law, cannot be filled by a person from the President's political party - the President traditionally nominates the person recommended by the Republican Leader of the Senate, Senator Mitch McConnell (R-KY). Senator McConnell recommended Ann Begeman to the President. As a former Senate staffer, her confirmation is likely assured.

Many of us have gotten to know Ann much better through the negotiating process that resulted in S.2889. While her actions when



on the Board cannot be predicted, she clearly understands the concerns of rail customers and, presumably, is committed to the solutions contained in S.2889. Ann is not an attorney, which perhaps many folks will see as a most positive attribute. Ann is originally from South Dakota. (TR will cover more about Ms. Begeman in future editions)

**Blessed and Merry Christmas and Best Wishes for a Good New Year**

**Terry Whiteside**